No. 06-581

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In The

Supreme Court of the United States

ALLEGRETTI & COMPANY,

Petitioner,

v.

COUNTY OF IMPERIAL, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The real questions presented by this case already have been answered in the negative in prior decisions of this Court:

1. Should a court use a physical takings analysis when considering whether purely regulatory actions (specifically, a county attempting to complete environmental review prior to issuing a well drilling permit, and then offering a modified permit that never actually took effect) created a taking?

2. Should a plaintiff prevail on a categorical regulatory taking claim when that plaintiff continues to profitably use the allegedly taken property?

3. Should a plaintiff prevail on a *Penn Central* regulatory taking claim when it has demonstrated neither the scope of its investment-backed expectations nor that those expectations were reasonable; and also has not shown the extent of any interference with those expectations?

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INTRODUCTION

In rejecting Allegretti and Company's inverse condemnation claim, the California Court of Appeal adhered carefully to the settled principles articulated by this Court in *Lingle v. Chevron USA*, 544 U.S. 528 (2005), *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and many other cases. That adherence to settled takings law creates no need for further review, and Allegretti's arguments to the contrary are based largely on distortions of both the facts of the case and the legal questions raised.

STATEMENT OF THE CASE

This action arose because Allegretti & Company (Allegretti) applied for a permit to install a new groundwater well on its property, but declined to cooperate in the environmental review procedure that under California state and local law must precede issuance of such permits.

Allegretti owns land in Imperial County, one of the United States' hottest and driest areas. Allegretti leases that land to a tenant farmer, who actively farms the land. That tenant irrigates his crops by pumping groundwater from four on-site groundwater wells. Those wells draw their water from a regional aquifer.

The County never has limited the amount of water those four wells are able to pump. Nor has the County ever

drawn water from the aquifer. Throughout the period that Allegretti identified as the time of the alleged taking, Allegretti's tenant continued to pump water. Allegretti also received rent payments from the tenant and participated in the tenant's profit-sharing plan, which Michael Allegretti described as "very profitable." Respondent's Appendix (in the California Court of Appeal) at 386.

In 1994, Allegretti applied for a conditional use permit to install and operate a fifth well. The County's well drilling ordinance defines approval of a well-drilling permit as a discretionary act and requires the County to comply with the California Environmental Quality Act (CEQA, Cal. Pub. Res. Code, §§ 21000, *et seq.*)[1] before issuing an approval. The County therefore asked Allegretti to cooperate (by providing information about planned pumping levels and existing hydrologic conditions) in the preparation of environmental review.

Allegretti declined to cooperate, and later sued the County (unsuccessfully; the case was dismissed) when the County decided to prepare a full environmental impact report. To resolve the conflict, the County offered Allegretti a compromise: it would issue a permit, but that permit would limit overall levels of pumping from Allegretti's five

[1] Like the National Environmental Policy Act, on which it is partly modeled, CEQA requires state and local government agencies to review the environmental consequences of government actions that may significantly affect the environment, and to do so before those actions are taken. *See* Cal. Pub. Res. Code § 21080(d) (stating that an environmental impact report must be prepared before approving a project that may have significant environmental effects).

wells. The proposed limit – 12,000 acre-feet[2] per year on a 2,400 acre parcel – exceeded the total amount Allegretti claimed to need or want. Allegretti refused to record the permit, which therefore never took effect. Allegretti instead filed this inverse condemnation action against the County.

The County filed a demurrer, alleging that Allegretti was obliged to proceed with a mandamus action rather than an inverse condemnation claim. The trial court sustained the demurrer, but the California Court of Appeal reversed. It held that the County's well-drilling ordinance did not facially recite sufficient standards to allow the County to include pumping limitations in a permit, and remanded for proof beyond the pleadings on that issue. The court also held, however, that California law supported the County's general authority to regulate groundwater. The Court of Appeal did not exempt the County from complying with CEQA prior to issuing a permit, and thus its holding did not empower the County to approve Allegretti's permit application without first completing environmental review.

The case then proceeded to trial, and the trial court rejected Allegretti's inverse condemnation claims, holding that "plaintiff's evidence failed to show that the conditions placed on issuance of the permit would have any economic impact at all." Allegretti's App. at 46. In unanimous decisions, the California Court of Appeal affirmed, and the California Supreme Court denied Allegretti's petition for review.

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[2] An acre-foot of water is enough water to flood one acre of land to a depth of one foot. Thus, Allegretti still would have had enough water to annually flood its entire property five feet deep.

DISCUSSION

In its petition for certiorari, Allegretti asserts no conflict among the decisions of the United States Courts of Appeals; no conflict between a federal appellate court and a state court of last resort; no departure "from the accepted and usual course of judicial proceedings"; no conflict among state courts of last resort; and no conflict between state court decisions and the decisions of this Court. *See* Supreme Court Rule 10. Nor could it, for no such conflicts exist. Allegretti instead rests its request for certiorari entirely on a contention that the court of appeal "decided an important question of federal law that has not been, but should be" settled by this Court. *See id.*

That contention is groundless. As discussed below, and as evinced by its carefully written opinion, the court of appeal carefully adhered to well-established legal principles.

I. The California Court of Appeal Followed Established Principles in Rejecting Allegretti's Physical Takings Claim

Allegretti's first asserted basis for review – its request for the Court to reject "the simplistic conclusion that takings claims are either 'regulatory' or 'physical,'" – ignores the well-settled principles that led the California courts to reject Allegretti's physical taking claim.[3]

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[3] Allegretti's framing of the question – "when property owners' right of access to water beneath their land is substantially abrogated by a government agency, is the resulting taking measured . . . " – also assumes several unsupportable factual and legal premises. *See* Petition at 1. Allegretti never actually showed that its right of access to water

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In *Tahoe-Sierra Preservation Council*, the Court cautioned that the difference between physical and regulatory takings "makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." 535 U.S. at 323-24; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (using a regulatory takings analysis to evaluate a regulation that denied a plaintiff all economically viable use of his entire property, and noting that physical takings fell into a separate "discrete categor[y]"); *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.") (emphasis in original).

That distinction is particularly important here, for the County has never done anything that fits within the traditional definition of a physical occupation or invasion. It has not appropriated Allegretti's water, physically occupied or invaded the aquifer, established any physical presence on Allegretti's property, or enabled a third party to do so. Its actions were classically regulatory restrictions on use; it required Allegretti to obtain a permit and then offered a modified permit in response to Allegretti's unwillingness to cooperate in environmental review. No authoritative federal or state decision supports Allegretti's attempt to treat those routine regulatory actions as

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beneath its land was "substantially abrogated." *See* Part III, *infra*. Nor did it ever demonstrate the existence of a "resulting taking."

physical takings, and the court of appeal followed settled law in rejecting that attempt.[4]

II. The California Court of Appeal Followed Established Principles in Rejecting Allegretti's Categorical Regulatory Taking Claim

Allegretti next asserts that the Court must assess whether Allegretti, which continued to profitably use the supposedly taken property, suffered a *categorical* regulatory taking. But in rejecting that theory, the Court of Appeal again followed well-established law.

Only in those rare circumstances where a regulation permanently denies a property owner "*all* economically beneficial or productive use" of its property may the regulation effect a categorical taking. *Lucas*, 505 U.S. at 1015 (emphasis added). The Court's use of the word "all" is not coincidental; it has cautioned that "[a]nything less than a 'complete elimination of value,' or a 'total loss,' . . . would require the kind of analysis applied in *Penn Central*" rather than application of the *Lucas* categorical test. *Tahoe Sierra Preservation Council*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017, 1019-20 & n.8). Consequently,

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[4] Allegretti attempts to manufacture a cert-worthy conflict out of one anomalous decision of the Federal Court of Claims, *see Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001), but that decision has no precedential value and thus is incapable of creating any conflict of authority. The Court of Claims itself has neutralized that decision by rejecting its analysis. *See Klamath Irrigation District v. United States*, 67 Fed. Cl. 504, 538-40 (2005). But Allegretti's petition, though it repeatedly cites and heavily relies upon *Tulare Lake*, incongruously fails even to mention *Klamath Irrigation District*.

a categorical regulatory taking arises only in an "extraordinary circumstance." *Id.*

This case presented no such extraordinary circumstance. Allegretti received both profit-sharing and rent payments throughout the period of the alleged taking. It has always had access to as much water as its four existing wells could pump. To hold, under such circumstances, that Allegretti was denied "all economically viable use" of its property would render that phrase meaningless.

III. The California Court of Appeal Followed Established Principles in Rejecting Allegretti's *Penn Central* Regulatory Taking Claim

In challenging the California court's *Penn Central* analysis, Allegretti contends that the Supreme Court should use this case to refine the meaning of the phrase "investment-backed expectations." But even if one assumes, *arguendo*, that such refinement is needed, this is not the case to provide it. Allegretti failed to demonstrate what its investment-backed expectations were, whether its expectations were reasonable, and the extent, if any, to which the County's actions interfered with those expectations. Accordingly, the Court of Appeal's application of the second prong of the *Penn Central* analysis was also entirely consistent with settled law.

Allegretti never clarified the scope of its expectations. Instead, as the Court of Appeal explained, "Joe Allegretti's testimony was only that he purchased the farm having been given lots of reassurances that it *could* be a viable farming operation." Allegretti's App. at 21 (emphasis in original). At the trial itself, Michael Allegretti specifically testified that when asked how much water Allegretti

expected to use, "I told different amounts at different times." Reporter's Transcript at 240:13-15. Accordingly, the court of appeal's demand for more specific evidence simply applied traditional legal standards and requires no correction from this Court. *See* Allegretti's App. at 21 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984)).

Nor did Allegretti demonstrate that its unspecified, inchoate expectations were reasonable. Based on Allegretti's subsequent litigation posture, and on its failure to even attempt to prove the scope of its groundwater use rights, Allegretti may have expected to pump without any regulatory constraint. But because of both long-established law and the realities of an arid and variable climate, all California water use rights are necessarily "limited and uncertain." *United States v. California State Water Resources Control Board*, 182 Cal.App.3d 82, 104 (1986); Cal. Const. art. X § 2 (limiting rights to uses that are "reasonable"). Groundwater use rights are further constrained by the requirement that no user can take more than its "proportionate fair share" of the waters in a shared aquifer, *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1253 (2000). California counties may also impose limits designed to protect scarce groundwater resources. *In re Maas*, 219 Cal. 422, 424-25 (1933); *Baldwin v. County of Tehama*, 31 Cal.App.4th 166 (1994). For those reasons, Allegretti could not reasonably anticipate limitless pumping from a shared desert aquifer – particularly where, as Allegretti's own consultant acknowledged, water levels in that aquifer were steadily declining. *See* Respondent's Appendix at 257-58 (documenting the drawdown); *Pasadena v. Alhambra*, 33 Cal.2d 908 (1949)

(holding that a user may be enjoined from taking more than an aquifer's safe yield).

Having demonstrated neither what its expectations were nor why they were reasonable, Allegretti failed to establish any interference with reasonable investment-backed expectations. The 12,000 acre-feet per year limitation the County proposed never actually took effect, and even if it had, that limitation would have exceeded Allegretti's claimed water needs. *See* Allegretti's App. at 4-5 (explaining that Allegretti sought only a modest increase in its farming acreage). Similarly, directing Allegretti to comply with standard permitting requirements could not interfere with reasonable expectations, for Allegretti could not reasonably assume the County would grant a permit without first complying with the mandates of applicable law.

This case therefore creates no need for the Court to reject the court of appeal's routine application of the *Penn Central* standard, or to revisit the meaning of "reasonable investment-backed expectations." Under any plausible interpretation and application of that phrase, the court of appeal's decision was correct, and indeed was compelled by the facts of this case.

CONCLUSION

Supreme Court Rule 10 cautions that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Yet those are the types of claims Allegretti's petition asserts, and its contentions of misapplication, like its factual assertions, lack foundation. The California

courts carefully adhered to settled legal standards and correctly applied those standards to facts that could not, under any reasonable analysis, sustain a takings claim. That adherence to settled law creates no need for this Court's review.

Respectfully submitted,

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